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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1052

J. FRANK HOGUE,
Petitioner,

vs.

CLINTON T. DUFFY, Warden, San Quentin Penitentiary,
Respondent.

BRIEF FOR RESPONDENT

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SUBJECT INDEX

Page

THE SCOPE OF REVIEW ON CERTIORARI IS LIMITED TO THE SOLE ISSUE RAISED IN THE PETITION AS TO WHETHER SAID UNITED STATES DISTRICT COURT ABUSED ITS DISCRETION IN ITS REFUSAL TO CONSIDER THE MERITS OF THE PETITION ON HABEAS CORPUS ---------- 4

THE UNITED STATES DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS REFUSAL TO ASSUME JURISDICTION OF THE HABEAS CORPUS PROCEEDING ON ITS MERITS----------4–6

IF PETITIONER FELT AGGRIEVED BY THE ACTION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA IN DENYING HIS APPLICATION ON HABEAS CORPUS, HE SHOULD HAVE TAKEN THE MATTER DIRECTLY TO THE UNITED STATES SUPREME COURT ----------6–8

TABLE OF AUTHORITIES CITED

	Page
Alice State Bank, et al. v. Houston Pasture Co., 247 U. S. 240, 242	4
In re Anderson, 117 Fed. (2nd) 939, 940	6
Collins v. Smith, 17 Fed. (2nd) 988	7
Ex parte Jefferson, 106 Fed. (2nd) 471	6
Kramer v. State of Nevada, 122 Fed. (2nd) 471	6
Ex parte Melendez, 98 Fed. (2nd) 791	7
In re John Russell Miller, decided Mar. 21, 1942	5
Mooney v. Holohan, 294 U. S. 103	6
Palmer v. McCauley, Warden, 103 Fed. (2nd) 300	6–7
Webster Electric Co. v. Splitdorf, 264 U. S. 463	4
Ex parte Whitacre, 17 Fed. (2nd) 767	7

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This petition on certiorari, directed to the United States Circuit Court of Appeals, Ninth Circuit, is taken from the decree of said appellate court (R. 60, 61), affirming an order of the United States District Court for the Northern District of California, at San Francisco, denying an application for a writ of habeas corpus. (R. 47.)

From the petition of petitioner on habeas corpus, filed in said United States District Court (R. 1-45), it appears that on April 28, 1935, petitioner pleaded guilty to two counts of a written accusation (character undisclosed), each charging a violation of section 288, Penal Code (lewd and lascivious acts upon the body of a child under fourteen years of

age), in the Superior Court of the State of California at Los Angeles; that on said last mentioned date and upon petitioner's plea of guilty to each of said counts, judgment was rendered thereon, by which petitioner was sentenced on each count to the State Prison at San Quentin, California, for the term prescribed by law, said sentences to run concurrently (R. 4, 5); that on the 8th day of October, 1936 the Board of Prison Terms and Paroles fixed the terms of imprisonment of said petitioner on said two counts at twenty years and five years respectively, to run concurrently, (R. 5; Exhibit B, R. 43);

That on the 26th day of October, 1940 petitioner filed a petition for habeas corpus in the Superior Court of the State of California, in and for the County of Marin, which was denied by said court on the 14th day of November, 1940; that a similar petition was filed in the district Court of Appeal of California, which was denied on the 11th day of November, 1940, and that a similar petition for habeas corpus was filed in the Supreme Court of the State of California, which was denied on the 17th day of March, 1941. (R. 2, 3.)

No appeal or other proceeding was taken to this Court from the order of said Supreme Court of the State of California. Having exhausted his remedy in the State courts, he sought relief, as indicated, in said United States District Court

and said Circuit Court of Appeals, by similar judicial process.

Petitioner has been imprisoned in said penitentiary since his commitment by said Superior Court.

The grounds of the petition on habeas corpus filed in said United States District Court are set forth in the opinion of the Circuit Court of Appeals (R. 56-60), to the effect his imprisonment in said penitentiary is in violation of his rights secured by the Fifth and the Fourteenth Amendments to the Constitution of the United States and of Article I, Section 9, Clause 2 thereof.

The order of said United States District Court and the decree of affirmance of said Circuit Court of Appeal are based only upon the proposition that where a petitioner has exhausted his remedy in the State courts on habeas corpus proceedings, the United States District Court and the Circuit Court of Appeal, in the absence of exceptional circumstances will not interfere but will leave petitioner to take his case directly to the United States Supreme Court.

Before considering whether there has been an abuse of the discretion of said Federal courts, let us examine the scope of the inquiry raised by the petition on certiorari filed in this Court.

THE SCOPE OF REVIEW ON CERTIORARI IS LIMITED TO THE SOLE ISSUE RAISED IN THE PETITION AS TO WHETHER SAID UNITED STATES DISTRICT COURT ABUSED ITS DISCRETION IN ITS REFUSAL TO CONSIDER THE MERITS OF THE PETITION ON HABEAS CORPUS

It has been repeatedly held that this Court, sitting as a court of review, will not consider questions which are not raised by the petition on certiorari.

Webster Electric Co. v. *Splitdorf Electric Co.*, 264 U. S. 463, 464;

Alice State Bank et al. v. *Houston Pasture Co.*, 247 U. S. 240, 242.

An examination of the petition herein will show that the sole issue raised is whether the United States District Court abused its discretion in its refusal to hear the petition on habeas corpus on its merits.

THE UNITED STATES DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS REFUSAL TO ASSUME JURISDICTION OF THE HABEAS CORPUS PROCEEDING ON ITS MERITS

In affirming the order or decree of the United States District Court denying the petition of petitioner on habeas corpus, the Circuit Court of Appeals said:

> "In the circumstances, in view of the well settled state of the law in cases such as this, where the state remedies have been exhausted

by the applicant, but he has failed to seek review in the Supreme Court of the United States of the action of the highest court of the state, it would be improper for us to discuss the merits of petitioner's case. Directly in point, and authoritative, is *Palmer* v. *McCauley, Warden,* 9 Cir., 103 F2d 300, 301, where we said that 'the appropriate way to raise questions involving the validity of a commitment under a state law is by application of the state courts, and if denied by appeal to the Supreme Court of the United States.' See also *Urquhart* v. *Brown,* 205 U. S. 179; *Kramer* v. *State of Nevada,* 9 Cir., 122 F2d 417; *Ex parte Jefferson,* 9 Cir., 106 F2d 471; *Ex parte Penney,* 9 Cir., 103 F2d 27; *Ex parte Melendez,* 9 Cir., 98 F2d 791.

Moreover, it is not apparent that this is one of the 'rare cases where exceptional circumstances of peculiar urgency are shown to exist' (*United States ex rel. Kennedy, et al.* v. *Taylor,* 269 U. S. 13, 17), which might possibly justify the issuance of the writ, and we hold there was no abuse of discretion in the denial of it." (R. 59, 60.)

In *In re John Russell Miller,* decided by the Ninth Circuit on March 21st, 1942, a similar situation is presented. There the petitioner applied for successive writs of habeas corpus in the courts of this State, which were in turn denied. No appeal was taken to this Court from the order of the State Supreme Court denying the application. He presented a similar application to the Ninth Circuit Court of Appeals. In denying the application, said

Circuit Court of Appeals, quoting from *Kramer* v. *State of Nevada,* 122 Fed. (2nd) 417, at page 419, said:

> "Moreover, in view of the delicate question of interference by inferior Federal courts with the judgment of the courts of a sovereign state of the Union which is presented by an application such as this, it appears to be the approved practice that if such an application is to be presented after exhaustion of the State judicial remedies, it should be made directly to the Supreme Court of the United States. See *Mooney* v. *Holohan,* supra; *Ex parte Jefferson,* 9 Cir., 106 F. 2d 471, 472; *Ex parte Penney* 9 Cir., 103 F. 2d 27, 28."

See, also

Mooney v. *Holohan,* 294 U. S. 103;
In re Anderson, 117 Fed. (2nd) 939, 940;
Ex parte Jefferson, 106 Fed. (2nd) 471.

IF PETITIONER FELT AGGRIEVED BY THE ACTION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA IN DENYING HIS APPLICATION ON HABEAS CORPUS, HE SHOULD HAVE TAKEN THE MATTER DIRECTLY TO THE UNITED STATES SUPREME COURT

Thus, in *Palmer* v. *McCauley, Warden,* 103 Fed. (2nd) 300, the Court said:

> "We need not go into the merits of the controversy for it is well settled that whether or not a federal court will issue a writ of habeas corpus to release a prisoner held under a commitment from a state court is one of discretion.

Ex parte Royall, 117 U. S. 241, 6 S. Ct. 734, 29 L. Ed. 868; *Ex parte Fonda,* 117 U. S. 516, 6 S. Ct. 848, 29 L. Ed. 994; *Wood* v. *Brush,* 140 U. S. 278, 11 S. Ct. 738, 35 L. Ed. 505. That discretion should be exercised in the light of the principles announced by the Supreme Court in *Urquhart* v. *Brown,* 205 U. S. 179, 27 S. Ct. 459, 51 L. Ed. 760, wherein it is held that the appropriate way to raise questions involving the validity of a commitment under a state law is by application to the state courts, and if denied by appeal to the Supreme Court of the United States. *Ex parte Melendez,* 9 Cir., 1938, 98 F. 2d 791; *Ex parte Penney,* 9 Cir., 103 F. 2d 27, March 24, 1939. There are no exceptional circumstances involved in the instant case which would justify the interposition of the District Court."

See, also

Ex parte Whitacre, 17 Fed. (2nd) 767;
Collins v. *Smith,* 17 Fed. (2nd) 988;
Ex parte Melendez, 98 Fed. (2nd) 791.

This Court cannot entertain the petition on certiorari directed to the Ninth Circuit unless error has been committed in the refusal of the United States District Court to hear petitioner's application for a writ of habeas corpus on its merits. It has already been shown that this was a matter of discretion with said United States District Court and that there has been no abuse of said discretion.

It is submitted that the petition on certiorari contains no merit and that the same should be dismissed.

April 5, 1942.

Respectfully.

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